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No. 84-1416

# In the Supreme Court of the United States

OCTOBER TERM, 1984

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SUMCO MANUFACTURING CO., INC., ET AL., PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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Petitioners, who were found to have committed unfair labor practices, contend, first, that a backpay award was improper, and second, that they were prejudiced by a Sixth Circuit rule that treats parties seeking to avoid enforcement of orders of the National Labor Relations Board as petitioners for certain limited purposes.

1. Petitioners Sumco Manufacturing Co., Inc. and Summit Grinding and Machine Co.[1] are Ohio corporations engaged in the manufacture of automobile jacks and related parts. In 1977 and 1978 Sumco employees undertook a

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[1]The decisions below refer to "Summit Grinding Company." Petitioners state (Pet. 3) that "no such corporation" exists and that the company's actual name is Summit Grinding and Machine Co.

campaign to obtain union representation. The Board found that Sumco and Summit (hereinafter jointly referred to as Sumco) constituted a single employer and that it violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by laying off six employees due to their union activity and by hiring or transferring new employees to job vacancies before recalling 10 other laid-off employees who supported the union campaign.[2] The Board ordered that valid offers of reinstatement be made to each of the 16 employees and that each be made whole for any losses incurred by reason of Sumco's unlawful conduct. Pet. App. A81-A86. The court of appeals enforced the Board's order in full in 1982 (Pet. App. A3).

2. The Board then instituted a proceeding pursuant to 29 C.F.R. 102.52-102.59 to determine the amounts of backpay due the 16 employees. The Board's Regional Director issued a backpay specification calculating the amounts owed. Following a hearing, an administrative law judge (ALJ) concluded that Sumco had failed either in its answer to the specification or at the hearing to state any basis for disagreement with the Regional Director's backpay formula and figures or to offer any alternative to them. Accordingly, the ALJ granted the General Counsel's motion for summary judgment, awarding the amounts contained in the specification. Pet. App. A7. The ALJ further concluded that Sumco had not made valid offers of reinstatement to any of the 16 employees, that it had failed to show that any of them had failed unjustifiably to seek or accept interim employment, and that Sumco had failed to show that an

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[2]The Board also found that Sumco violated Section 8(a)(1) of the Act by interrogating and threatening employees due to their union activity, by promising them raises if they stopped supporting the union, and by enforcing plant rules more strictly against union supporters (Pet. App. A33, A82).

alleged loss of business precluded it from offering them jobs (*id.* at A8-A29).

The Board adopted the ALJ's backpay decision and ordered Sumco to make the employees whole through June 30, 1982, in the amounts determined by the ALJ. The Board's order also provided that Sumco's backpay liability continues until it makes valid offers of reinstatement to the employees, with the amount of backpay accruing after June 30, 1982, to be determined in supplemental proceedings if necessary. Pet. App. A25.[3]

3. The Board applied to the court of appeals for enforcement of its backpay order. Sumco, which was required under Sixth Circuit Rules 22 and 11 to file the opening brief and to prepare and submit a joint appendix after the Board's brief was filed, moved "to dispense with a joint appendix * * * and * * * to proceed * * * on the original record" (Pet. App. A94). The court of appeals denied Sumco's motion (*id.* at A95). Thereafter, in response to Sumco's claim that it could not file a joint appendix because it did not know what materials to include, the court instructed Sumco on two separate occasions that the joint appendix should include those portions of the record referred to in the parties' briefs (*id.* at A100, A105). Sumco failed to file a joint appendix and waived oral argument (*id.* at A106).

The court of appeals enforced the Board's supplemental backpay decision (Pet. App. A1-A2). The court noted that "the argument advanced by [Sumco] appears essentially to reargue the unfair labor practice case which has previously been finally decided against [it]" and also "that the

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[3]Petitioners did not include in the appendix to their petition the Board's decision and order adopting the ALJ's recommended backpay decision. The Board's decision is reported at 267 N.L.R.B. 253 (1983).

company belatedly has sought to raise contentions concerning backpay which should have been raised before the Board * * * [and] cannot be adjudicated on appeal by this court" (*id.* at A2). The court stated that "[a]n additional reason for [its decision] is that counsel for [Sumco] failed to file a joint appendix * * * as ordered by this court" (*ibid.*).

4. Petitioners contend (Pet. 10) that the Board's order that backpay liability will continue to run until valid reinstatement offers are made is "confiscatory" and "punitive." This contention is based on the unsupported assertion, rejected by the ALJ (Pet. App. A14-A16), that Sumco no longer had work that the 16 employees could perform at the time of the backpay proceeding. This fact-bound issue does not warrant review by the Court.[4]

5. Petitioners also contend (Pet. 7-10) that the Sixth Circuit's rules that require that the party challenging a Board order file the opening brief and prepare a joint appendix are "designed to shift the burden of proof to the Respondent(s) in NLRB cases * * * and [are] contrary to due process of law as guaranteed in the Fifth Amendment" (*id.* at 8). That contention lacks merit and does not warrant review by this Court.

Sixth Circuit Rule 22 provides that "[i]n an application for enforcement by the National Labor Relations Board under Rule 15(b), Federal Rules of Appellate Procedure, the respondent(s) shall be considered the petitioner(s), and the NLRB considered the respondent, for the purposes of

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[4]In addition, to the extent that petitioners contend that the Board's underlying unfair labor practice finding and remedial order "were not based on substantial evidence" (Pet. 6), or were otherwise improper, their time for filing a petition for certiorari to review the court of appeals' judgment enforcing the Board's decision in the underlying unfair labor practice case has long since expired.

briefing and oral argument, unless the court orders otherwise." Federal Rules of Appellate Procedure 30 provides that "[t]he appellant shall prepare and file an appendix to the briefs" containing relevant parts of the record, and Sixth Circuit Rule 11(c) provides that "[t]he appellant shall serve and file the joint appendix within twenty-one (21) days of the filing of the appellee's brief." Thus, under these rules Sumco was required to file the opening brief and, after the Board's brief was filed, to prepare and file a joint appendix containing the portions of the record referred to in the briefs.

Contrary to petitioners' contention, they were not denied due process by the Sixth Circuit's "flip" rule in Board enforcement cases. Similar rules have been adopted in many circuits.[5] These rules neither shift the burden of proof to parties contesting the Board's decision nor alter the standards of review by which courts of appeals are to judge whether Board orders are entitled to enforcement. Rather, such rules are simply reasonable means of pinpointing the issues on appeal by requiring the contesting party to set forth its contentions in an opening brief and allowing the Board to respond specifically in its brief. Moreover, such rules afford the contesting party an opportunity that it would not otherwise have to respond by filing a reply brief.[6]

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[5]All circuits except the Tenth Circuit and District of Columbia Circuit have adopted "flip" rules similar to Sixth Circuit Rule 22 in cases where the Board applies for enforcement. See lst Cir. R. 22; 2d Cir. R. 15; 3d Cir. R. 26; 4th Cir. R. 22; 5th Cir. R. 7; 6th Cir. R. 22; 7th Cir. R. 9(j); 8th Cir. R. 27; 9th Cir. R. 24; 11th Cir. R. 9.

[6]Petitioners' contention (Pet. 7, 10) that the Board refused to cooperate in supplying designations for the joint appendix is erroneous. The Board, as is its practice and as the court of appeals instructed Sumco on two occasions, informed counsel for Sumco that the joint appendix was to contain those portions of the record cited in the briefs. Petitioners' apparent further contention (Pet. 7-8) that the court of appeals did not

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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properly consider the record underlying the Board's backpay decision *because* it did not have the benefit of a joint appendix is equally groundless. As the court made clear (Pet. App. A2), it fully considered the briefs and the record in enforcing the Board's order.

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